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13 UNITED STATES DISTRICT COURT  
14 FOR THE DISTRICT OF ARIZONA

15 In Re Bard IVC Filters Products  
16 Liability Litigation

17 No. MD-15-02641-PHX-DGC

18 **PLAINTIFFS' TRIAL BRIEF ON**  
19 **ALLOCATION OF FAULT OF DR.**  
20 **HALLER**

21 (Assigned to the Honorable David G.  
22 Campbell)

23 This Document Relates to:

24 *Debra Tinlin, et al. v. C. R. Bard, Inc.,*  
25 *et al.*

26 CV-16-00263-PHX-DGC

1 Pursuant to the Court's request during the pretrial hearing in the *Tinlin* matter on  
2 April 29, 2019, Plaintiffs respectfully submit this supplemental briefing on application of  
3 the *Selleck* rule as to Dr. Roger Haller, because Mrs. Tinlin was originally injured before  
4 Dr. Haller read her CT scan.

5 Dr. Haller is the radiologist who reviewed Mrs. Tinlin's CT scan during a course of  
6 treatment unrelated to her Recovery filter, which was implanted in Mrs. Tinlin three years  
7 prior on May 7, 2005. In April 2008, Dr. Haller reviewed the CT scan specifically for  
8 lung-related issues, only, and did not identify fractured struts that had embolized to Mrs.  
9 Tinlin's heart. Five years later, on June 10, 2013, Mrs. Tinlin experienced cardiogenic  
10 shock and multi-organ failure. At that time, Mrs. Tinlin's medical team discovered her  
11 Recovery filter had fractured, and two struts had embolized to her right ventricle. On July  
12 31, 2013, Mrs. Tinlin underwent open heart surgery to remove a fractured strut. Other  
13 pieces of her Recovery filter remain in her upper and lower lungs.

14 Bard argues Dr. Haller committed malpractice in April 2008 by failing to see  
15 and/or identify the fractured struts in Mrs. Tinlin's heart. *See* Defendants' Trial Brief on  
16 Third Party Fault, Dkt. 16946 at 5-6. However, Bard has not specified how Dr. Haller's  
17 alleged negligence actually caused or contributed to Mrs. Tinlin's injuries, though even if  
18 it had, such negligence evidence would be irrelevant. Under Wisconsin law, Mrs. Tinlin  
19 suffered an injury as a matter of law when her filter fractured and struts migrated to her  
20 heart and lungs, thus, Bard is not entitled to allocation of fault of Dr. Haller under the  
21 *Selleck* rule.

22 Under the *Selleck* rule, defendants are liable for "damages for injuries aggravated  
23 by subsequent mistaken medical treatment ... [a]ssuming that the plaintiff exercised good  
24 faith and due care in the selection of [her] treating physician." *Fouse v. Persons*, 259  
25 N.W.2d 92, 94-95 (1977). Where there are separate injuries, or where an original injury is  
26 aggravated, as in the malpractice context, "there are separate torts rather than joint  
27 liability," and apportionment is *improper*. *Johnson v. Heintz*, 243 N.W.2d 815, 826 (Wis.  
28 1976) (specifically distinguishing between two tortfeasors whose "actions concur in

1 time . . . to create an injury-producing situation," and where the actions of others "resulted  
 2 in distinguishable separate injuries to the same subject.") (citing Prosser, *Law of Torts*, p.  
 3 317, sec. 52 (4th ed. 1971)). Pursuant to Wisconsin law, for purposes of determining  
 4 when an injury has occurred, courts look for "physical injurious change" to the patient's  
 5 body. *See Estate of Genrich v. Ohic Ins. Co.*, 769 N.W.2d 481, 487 (Wis. 2009)(injurious  
 6 change triggered SOL on date sponge was left in patient; infection caused by sponge and  
 7 surgery to remove it "inflicted an *additional* injury"). An injurious change occurs "when  
 8 the [negligent act or omission] causes a greater harm than [that which] existed at the time  
 9 of the [negligent act or omission]." *Id.* In fact *Genrich* made clear, an injury may be  
 10 asymptomatic, but "once a claimant has sustained an injury and has an enforceable claim,  
 11 that claimant cannot sit on that claim until all consequential damages have come to  
 12 fruition." *See id.*

13 Wisconsin Supreme Court precedent thus establishes that the presence of a foreign  
 14 body is an injury, and Bard's contention that Mrs. Tinlin was not injured is incorrect as a  
 15 matter of law. Mrs. Tinlin experienced an injurious change at a point in time when her  
 16 Recovery filter fractured and the struts embolized to her heart. As of the time of this  
 17 injurious change, Bard's defective Recovery filter was causing greater harm than had  
 18 existed at the time Bard negligently caused her to receive the defective filter. If Dr. Haller  
 19 indeed failed to see the fractured filter struts in Mrs. Tinlin's heart in a CT scan, as Bard  
 20 alleges, then Mrs. Tinlin already experienced an "injurious change" at the time of the  
 21 fracture and embolization of the struts to her heart, which occurred prior to Dr. Haller's  
 22 review. As such, even if Dr. Haller negligently caused Mrs. Tinlin harm, leading to  
 23 further complications, any such negligence would only have aggravated existing injuries.

24 Bard unpersuasively argues that *Selleck* does not apply to Dr. Haller's alleged  
 25 negligence because he could not have aggravated an existing injury that was  
 26 "asymptomatic." *See* Dkt. 16946 at 13. On its face, it's a fallacy for Bard to claim Dr.  
 27 Haller's alleged negligence did not aggravate an existing injury while also seeking to  
 28 blame him for the later resulting complications and surgical intervention. Regardless,

1 whether an injury is symptomatic is not determinative for when the injury occurs; rather,  
2 the test is whether the patient has experienced “injurious change.” *See Estate of Genrich*,  
3 769 N.W.2d at 487 (Wis. 2009) (finding that injury arises when the negligent act or  
4 omission causes a greater harm than that which existed at the time of the negligent act or  
5 omission).

6 Moreover, Bard is marginalizing the seriousness of Mrs. Tinlin’s injuries at the  
7 applicable time. Even if Mrs. Tinlin was not then aware of the danger, Bard has long  
8 known that fractured filters, along with struts embolizing in patients’ organs, are serious  
9 and hazardous adverse events associated with its IVC filters. In fact, Bard’s own medical  
10 director, Dr. David Ciavarella, testified that the presence of a fractured strut confers risk  
11 of severe injury, so the fracture itself is an injury because it increases the risk of severe  
12 harm and death. *See Exhibit A, Hyde v. Bard* Trial Tr. (confirming “fragment then going into  
13 the heart, specifically . . . could have resulted in death had there not been urgent open heart  
14 surgery to effect a repair and remove the fragment.”) Furthermore, fractured struts in the heart,  
15 even if asymptomatic, can cause fibrosis, like the sponge in *Genrich* that caused injury  
16 even before it caused the symptomatic infection.

17 To the extent that Dr. Haller was negligent in seeing or identifying fractured struts  
18 lodged in Mrs. Tinlin’s heart in her CT scans, any further injuries Mrs. Tinlin experienced  
19 would only be aggravations of those existing injuries. Additionally, Bard has not alleged  
20 that Mrs. Tinlin failed to exercise good faith and due care in selecting any of her treating  
21 physicians. Pursuant to *Selleck*, any alleged negligence of Dr. Haller is irrelevant and  
22 Bard would ultimately be responsible for resulting damages aggravated by such  
23 negligence. The jury should therefore not be permitted to allocate fault or damages to Dr.  
24 Haller.

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1 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of May 2019.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of May 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

/s/ Jessica Gallentine